APPENDIX "A."

(Memorandum Opinion on Motion to Remand.)

The question for decision in this case is whether the plaintiff, a minor nearly nineteen years of age, was capable under the law of choosing a residence or domicile different from that of his parents. If so, and if a choice had actually been made, then a diversity of citizenship does not exist and the case should be remanded to the court of its origin. Otherwise, jurisdiction should be retained.

The minor's mother and stepfather reside in Queen City, Schuyler County, Missouri. The minor formerly [fol. 27] resided with them at that place. His father died in 1926. His mother remarried in 1932. In the latter part of the year 1942 the minor left home for the purpose of seeking employment. There was no evidence of a breach of good will, affection and devotion between his mother and himself. Moreover, his relations with his stepfather did not lack cordiality. He left home with the idea of returning but in the meantime he expected to find employment and personally to receive the rewards of his labor. His mother, by deposition, testified that he left home "'to make his own way in the world," yet it was without her consent, as she testified, "I didn't want him to leave." After leaving home he wrote several letters to his mother wherein he related his experiences and how he was getting along. His letters were affectionate and filial. For a brief period he resided in Kansas City at a boarding house but later moved to Mission, Kansas, where he had obtained employment. He lived at a place where he was employed. He was inducted into the military service and all his statements and acts in-

dicated a purpose to return to his place om employment at Mission, Kansas. His employer had indicated a reemployment at the end of his military service.

Upon the foregoing facts, the defendant contends that, being a minor, he was not competent to determine the place of his residence or domicile and for the purposes of this action his residence or domicile was that of his mother and father. These contentions will be noticed.

1. By Section 374, R. S. Mo. 1939, it is provided that: "all persons of the age of 21 years shall be considered of full age for all purposes * * * and until that age is attained they shall be considered minors; * * *."

There are exceptions to this statutory rule of minority [fol. 28] not applicable here. Section 375, R. S. Mo. 1939, provides who shall be the natural guardians of minors. The provision is that: "* * * the father and mother, with equal powers, rights and duties, while living, and in the case of the death of either parent, the survivor * * * shall be the natural guardian * * * of their children, *and have the custody and care of their persons, education and estates;* * * *. The parents of such minor child * * * acting as such natural guardian * * * *shall be entitled to receive and collect the earnings of such minors,* until they reach their majority, and be liable for their support to the extent of such earnings; * * *."

Under this law it is held without exception that the natural guardian of a minor is entitled to the custody and care of such minor unless, of course, it be established that the parent is incompetent or unfit to have the custody and exercise control over him. *In re Smith,* 197 Mo. App. 200, l. c. 205; *State ex rel.* v. *Tincher,* 258 Mo. 1, l. c. 13.

In the case of *Waters* v. *Gray*, 193 S. W. 33, l. c. 35, the St. Louis Court of Appeals succinctly declared the law, when it said:

> "* * * And while the parents have a right, by nature and by law, to the custody of children, which right should never be denied, except for the most cogent reasons, yet whenever such occasions arise, and such occasions arise, not alone by reason of the lewdness, immorality or dissipation of the parents, or either of them, but whenever conditions are shown to be such that to continue the custody of the child with the parents, or either of them, would be contrary to the permanent well-being of the child, then that natural right of the parent must give way, for this natural right of guardianship is less paramount than the life, health, or morals of the child."

There is no evidence in this case that the minor's mother is not entirely competent and worthy of maintaining her custody and control over the life of the minor. There is no pretense that she is unworthy. Under the law such [fol. 29] rights should not be denied her "except for the most cogent reasons." Even by the common law, a surviving parent, if fit, has the right to the custody of the child. 46 C. J., Sec. 9, p. 1224.

2. It is contended by the minor, through his counsel, that he has been completely emancipated so that he is entitled to choose his own domicile. Reliance is placed upon the evidence of his mother, that, when he left, it was to make his own way. In the same deposition she testified that she did not want him to leave. Moreover, all his letters to his mother indicate that the relations of mother and son were not abrogated, nor do such communications breathe any suggestion of emancipation. The fact that he was permitted to work and draw his own compensation did not signify emancipation.

The cases cited and discussed by counsel relate to those cases where the parent had merely granted a license to the minor to work for wages and draw his own compensation. In the case of *Brosius* v. *Barker*, 154 Mo. App. 657, l. c. 663, the Springfield Court of Appeals declared the rule when it said that "emancipation is never presumed, and if relied upon as a defense, must be proven." The court further said that, without declaring general rules, "we hold that where the child who is physically and mentally able to take care of himself, has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him." That rule may be implied from the statute which devolves upon the parents the duty to support the minor "to the extent of such earning" when collected by the parents. In the Brosius case the court was considering the liability of the father for medical attention to the son where the son had been permitted to draw his own wages. At page 662 [fol. 30] the court indicated what constitutes complete emancipation as follows:

> "Complete emancipation is an entire surrender of all the rights to the *care, custody* and *earnings* of the child, as well as a renunciation of parental duties. * * * And the test to be applied is that of the preservation or destruction of the parental and filial relations."

No one could say that in this case, upon the evidence, there was a "destruction of the parental and filial relations." On the contrary, such relations continued to exist as indicated by the letters of the minor to his mother.

Moreover, the court, on the same page defined "implied emancipation" as follows:

> "* * * Implied emancipation is where the parent, without any express agreement by his acts or conduct, impliedly consents that his infant child may leave home and shift for himself. * * *."

It cannot be successfully urged that the conduct of either the minor or his mother indicated such consent. Although the mother did say that her son intended to go out and make his own way, this was against her consent.

In *McMorrow* v. *Dowell*, 116 Mo. App. 289, l. c. 298 (90 S. W. 728, l. c. 733) the court discussed the question of emancipation but it extended no further than the right of an employer to give employment to a minor and pay him without becoming liable to the parents. The court said:

> "* * * If a parent knows a child is working for stipulated wages, or in expectation of payment; knows, too, that the employer and the child understand payment is to be made to the child, and interposes no objection, these circumstances are evidence for the inference that the parent's right was waived. * * *."

The court was inclined to designate this as a limited emancipation, rather than a mere license. It appears that the courts have been disposed to use the word "emancipation" in relation to those cases where the parent sought to claim the wages of the minor. The word as a rule has been ineptly used. Very young children [fol. 31] are frequently permitted to seek employment, draw their wages and use it for their own spending money. It would be idle to say that this signifies emancipation and that the parents lost control and custody of the children and that they were at liberty to choose their own domicile.

In *Woodward* v. *Donnell,* 146 Mo. App. 119, l. c. 126, the court discussed the question of the right of the minor to collect his wages and referred to the right as one of emancipation rather than a mere license. In the case of *Evans* v. *Kansas City Bridge Co.,* 213 Mo. App. 101, the Kansas City Court of Appeals collated the law on the subject of parental rights over children employed away from home. That was merely a case of emancipation in relation to earnings although recovery was denied to the father on the usual grounds that he did not support the minor and therefor was not entitled to maintain suit for the death of his minor son.

In the very early case of *Ream* v. *Watkins,* 27 Mo. 516, the Supreme Court ruled that under the circumstances there given the minor son was entitled to draw his own wages, but that it was the right of the father at his pleasure to resume his authority over the minor son, including his earnings. There could not be complete emancipation under such circumstances and obviously the son could not choose his own domicile.

In the case of *Dierker, Etc.,* v. *Hess,* 54 Mo. 246, Judge Sherwood of the Missouri Supreme Court expressed the rule admirably in upholding the right of the son to receive wages and acquire property on his own account even though residing with his parents. Again, the fact did not clothe the son with the power to select his own domicile. It was a limited manumission while yet a member of the father's household.

3. Aside from the foregoing discussion the courts have held that a person, while a minor, but being *non sui juris,* cannot choose or change his domicile. That [fol. 32] was the ruling in *Delaware L. & W. R. Co.* v. *Petrowsky,* 250 Fed. 554. In that case the court said, with reference to the right of the parent to change the domicile of the

child, it depended upon "the parent's right to the custody of the child."

In the case at bar no one will contend that the mother did not have the right under the law to the custody and control of her son or that she had ever relinquished that right, but, even if so, it was within her power to reclaim it. While that power existed the son could not establish a residence *animus manendi*, for the reason that his mother had it within her power to determine the place of his residence.

In *Wiggins* v. *New York Life Ins. Co.*, 2 Fed. Supp. 365, the court held, "but even if he was emancipated this gives him no power to change his domicile."

An identical ruling was made by one of the judges in *Ex Parte Petterson*, 166 Fed. 536, l. c. 546, the court said:

> "* * * Applying the common law rule to this case, the petitioner did not reach her majority until the first day of December, 1906; prior to that time she was an infant incapable of choosing a domicile for herself, and up to that time her domicile had been that of her parents * * *."

It is not necessary to multiply the authorities. The rule is that a fit and upright parent is entitled to the care, custody and earnings of a minor child. This right continues until the minor has attained his majority. Until that right has been extinguished the minor cannot choose his domicile even though in the meantime a measure of manumission or emancipation is granted in respect of his earnings.

In view of the foregoing, the motion to remand should be overruled, AND IT IS SO ORDERED.

ALBERT L. REEVES,
United States District Judge.

APPENDIX "B."

Before WOODROUGH, JOHNSEN, and RIDDICK, Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the court.

The appellant, a minor, brought this action in a Missouri State court against the appellee, a Kansas bank engaged in business at Mission, Kansas. The bank removed the action to a Federal court in Missouri on the ground of diversity of citizenship. Appellant's motion to remand was denied. A trial in the District Court resulted in a judgment in favor of appellant. This appeal raises only the question of the jurisdiction of the Federal court. Jurisdiction depends upon whether the minor appellant was, under the facts in this case, capable of acquiring a domicile of his choice, and upon whether his domicile was in Kansas at the times material on the question for decision.

The facts are not in dispute. Appellant's mother and stepfather resided and maintained their home near Queen City in Schuyler County, Missouri. Until shortly before the present action was brought, the appellant lived with his parents, although for three and one-half years the greater part of his time had been spent away from their home. In December, 1942, when appellant had attained the age of eighteen years and five months, he left the home of his parents, with their consent, to make his way in the world. He had no definite destination in mind. It was understood by him and his parents that he left for the purpose of securing permanent employment wherever it might be found. At the time of his departure from home appellant had finished two years of high school, had spent one year in a Civilian Conservation Camp, and for many years had been accustomed to work for others for compensation. His reputation for industry and integrity was good.

On leaving the home of his parents, appellant went to Kansas City, Missouri, where he remained until he secured employment in a moving picture theatre in Mission, Kansas. He then removed to Mission, as he testified on the motion to remand, for the purpose of making that place his permanent home, and with a view to becoming a citizen of Kansas. Appellant resided continuously in Mission from the time of his removal there in January, 1943, until he was called into the army in March, 1943. Throughout that period he remained in the employ of the moving picture theatre. Shortly after his removal from Kansas City, Missouri, to Mission, Kansas, he wrote his mother requesting her to send him such of his personal belongings as he had not taken with him on his departure from home, accompanying his letter with money to pay the necessary transportation charges. In a letter to his mother after his entrance into the army, he wrote that his employer in Mission, Kansas, had promised to re-employ him on his discharge from the army, and that the many friends he had made in Mission assured him that he might have a home there as long as he desired. He also advised his mother that he had not maintained communication with his acquaintances in Queen City, Missouri, and that the only persons he missed in the army were the friends he had made in Mission.

Thirteen days after appellant had moved from Kansas City to Mission, this action was brought in the Missouri State court to recover damages which appellant claimed to have sustained as the result of his alleged false arrest and imprisonment by the bank. Appellant's contention is that the facts stated show that he had been completely emancipated by his parents; that, as an emancipated minor, he was capable of selecting a domicile of his choice; and that at all times important to decision here he was resident of Kansas, which is also the residence of the appellee bank.

Whether the appellant was an emancipated minor at the time of his departure from the home of his parents is a question controlled by Missouri law. Under Missouri law, emancipation of a minor need not be evidenced by any formal contract. Direct proof is not required. The emancipation of a minor is never presumed. The party relying upon it must establish it. *Brosius* v. *Barker*, 154 Mo. App. 657, 136 S. W. 18; *Singer* v. *St. Louis, K. C. & C. Ry. Co.*, 119 Mo. App. 112, 95 S. W. 944. As against his parents an emancipated minor is entitled to the fruits of his labor and compensation for personal injuries (*Beebe* v. *Kansas City*, Mo. App. 17 S. W. (2d) 608, 612), upon the principle that emancipation is the renunciation of parental duties to the minor and a surrender of the parents' right to the minor's services. See also *Ream* v. *Watkins*, 27 Mo. 516; *Dierker* v. *Hess*, 54 Mo. 246, where it is held that where a minor is permitted to work for himself and claim and enjoy his own wages, he may purchase and own property independent of his parents' control, even when he continued to live in his father's home; and *Evans* v. *Kansas City Bridge Co.*, 213 Mo. App. 101, 247 S. W. 213, in which a father was held not entitled to recover past wages paid his deceased minor son, where the father had not performed his correlative parental duties entitling him thereto.

"Generally the father, as head of the family, is entitled to the services of his minor children, or to their earnings, if by his permission they are employed by others. He is also under obligation to support his children during their minority. The right and obligation are correlative, and where the father neglects or refuses to support his child, denies him a home, or abandons him, so that he is obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings." *Swift & Co.* v. *Johnson*, 8 Cir., 138 Fed. 867, 872-

873. This case involved an action to recover for the death of a minor, prosecuted for the benefit of the father who had abandoned the child. The court reached the conclusion that there had been an emancipation of the minor and recovery could only be for nominal damages.

A leading Missouri case upon the question under consideration is *Brosius* v. *Barker, supra,* in which the court held that where a minor "who is physically and mentally able to take care of himself, has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him." The case involved an action against a father to recover the cost of medical and hospital treatment for his minor son who had left his home in Missouri to make his way in the world. The action was defended on the ground that the minor had been emancipated and that the father was not liable. In discussing the question of emancipation the court said (136 S. W. 19-20):

> "The general rule is that the father is under a legal obligation to maintain and support his infant child. The child comes into the world absolutely helpless and incapable of protecting itself. No creature is more helpless at birth than the human being, yet in some jurisdictions the courts hold that parents who have bestowed life, and have brought into the world these helpless creatures, are under no legal obligation to support or preserve them during the dependent period of their existence. *Kelley* v. *Davis,* 49 N. H. 187, 6 Am. Rep. 499; *Gordon* v. *Potter,* 17 Vt. 348. But the great weight of modern authority repudiates this doctrine and declares it to be opposed to natural sense of justice. *Huke* v. *Huke,* 44 Mo. App. 308; *Porter* v. *Powell,* 79 Iowa, 152, 44 N. W. 285, 18 Am. St. Rep. 353, 7 L. R. A. 176; *Guthrie* v. *Conrad,* 133 Iowa 171, 110 N. W. 454; *Rounds Bros.* v. *McDaniel,*

133 Ky. 669, 118 S. W. 956; *Ream* v. *Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Philpott* v. *Railroad*, 85 Mo. 164; *Mott* v. *Purcell*, 98 Mo. 247, 11 S. W. 564; 29 Cyc. 1675; *Johnson* v. *Gibson*, 4 E. D. Smith (N. Y.) 231; *Ramsey* v. *Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A., 682; *Kubic* v. *Zenke*, 105 Iowa 269, 74 N. W. 748; *Gotts* v. *Clark*, 78 Ill. 229.

"Complete emancipation is an entire surrender of all the rights to the care, custody, and earnings of the child, as well as a renunciation of parental duties. *Lowell* v. *Newport*, 66 Me. 78. And the test to be applied is that of the preservation or destruction of the parental and filial relations. *Sanford* v. *Lebanon*, 31 Me. 124.

"There are two kinds of emancipation, express and implied. Express emancipation takes place when the parent agrees with his child, who is old enough to take care of and provide for himself, that he may go away from home and earn his own living, and do as he pleases with the fruits of his labor. Implied emancipation is where the parent, without any express agreement by his acts or conduct, impliedly consents that his infant child may leave home and shift for himself. *Rounds Bros.* v. *McDaniel, supra; Lowell* v. *Newport, supra.*

"Emancipation was in early time evidenced and perfected by the formality of an imaginary sale. Subsequently this was abolished, and the simple process of manumission before a magistrate substituted. *Everett* v. *Sherfey*, 1 Iowa 358. In Louisiana the matter is expressly regulated by statute. But in the absence of statute the rule now is that emancipation need not be evidenced by any formally executed instrument, or by any record act, but is a question of fact which may be proven from circumstances, and direct proof is not required. *Canovar* v. *Cooper*, 3 Barb. (N. Y.) 115; *Benson* v. *Remington*, 2 Mass. 115; *Everett* v. *Sherfey, supra.*

"The question of emancipation must be determined upon the peculiar facts and circumstances of each

> case, and nothing more than general rules can be declared which will be applicable in all cases. *Inhabitants of Carthage* v. *Inhabitants of Canton,* 97 Me. 473, 54 Atl. 1104. Emancipation is never presumed, and, if relied upon as a defense, must be proven. *Singer* v. *Railroad,* 119 Mo. App. 112, 95 S. W. 944."

The District Court based its finding that the appellant was not emancipated upon the statement made by his mother in her deposition, read on the motion to remand, that she did not want the appellant to leave home; but, when the whole deposition is read, it is clear that whatever her wishes were she consented to the son's departure from the parental roof to make his way in the world. This is also the only conclusion that can be drawn from the testimony of the stepfather. It was, of course, natural that appellant's mother should have preferred him to remain at home with her, but, so long as she agreed with her son that he might leave to make his own way in the world, her natural preference is not significant on the question of his emancipation. It is important to note that there was nothing in the agreement between the parents and the son in this case which in any way limited the son in the choice of his place of residence. He was free to go where he wished, and, if capable of making a choice, to acquire a new domicile when and where necessary or convenient to the success of his effort to make his own way and to support himself. Implied in this agreement between the minor and his parents was a complete renunciation of the parental right to control the minor's domicile.

Since appellant was emancipated by an agreement between himself and his parents, the questions remain whether, as an emancipated minor, he was capable of acquiring a domicile of his choice, and whether, in fact and law, appellant did acquire a domicile in Kansas. Clearly, both

questions must be answered in the affirmative. The appellant in this case had reached an age of discretion, and established his competence to care for himself before he departed from the home of his parents. In such circumstances, modern authorities, preferring reality to fiction, sustain the right of an emancipated minor to acquire a domicile of his choice. "An emancipated child can acquire a new domicile of choice. Since he has to provide for himself, he should have power to choose his home." Restatement of Conflict of Laws, § 31. To the same effect, 1 Beale, Conflict of Laws, §§30.1, 31.1; Goodrich on Conflict of Laws, § 34; Dobie, Federal Procedure, p. 191. See also 30 Columbia Law Review 703. There are no Missouri decisions directly on the point. On principle, however, the Missouri cases cited above point to agreement with the modern rule.

The cases in other States are in conflict. Where the right of an emancipated minor to select a domicile of his choice is denied, decision is usually based on the fact that a minor, being *non sui juris,* is legally incapable of effecting a change of domicile. Cases so holding are *Gulf, C. & S. F. R. Co.* v. *Lemons,* 109 Tex. 244, 206 S. W. 75, 5 ALR 943; *Delaware, L. & W. R. Co.* v. *Petrowsky,* 2 Cir., 250 Fed. 554; and *Wiggins* v. *New York Life Ins. Co.,* 2 Fed. Supp. 365. Cases recognizing the rights of the minor are *Bjornquist* v. *Boston & A. R. Co.,* 1 Cir., 250 Fed. 929, 5 ALR 951; *Woolridge* v. *McKenna,* C. C. Tenn., 8 Fed. 650; *Russell* v. *State,* 62 Neb. 512, 87 N. W. 344; and *Cohen* v. *Del. L. & W. R. Co.,* 269 N.Y.S. 667. The cases are noted in 5 ALR 949. As stated in Goodrich on Conflict of Laws, §34(b), recognition of the right of an emancipated minor to choose a domicile "merely gives legal effect to what is already the fact."

Unquestionably, the minor in this case acquired a domicile in Kansas. To acquire a domicile of choice, the law requires the physical presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicile is instantaneous. Intention to live permanently at the claimed domicile is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, §§15, 22.

The judgment of the District Court is reversed with directions to remand this action to the State court.